The questions presented are:

1. Whether the Nevada Supreme Court's decision invalidating mining locations established after an exchange application is filed (but prior to publication of notice of the application) is inconsistent with 43 U. S. C., Ch. 8A, §315e.

2. Whether the State Supreme Court can, consistently with the Decisions of the Secretary of the Interior, hold that no valid mining claim exists in the absence of a hearing under the Administrative Procedure Act.

3. Whether a mining claimant must file a protest against an application made under the Taylor Grazing Act during the period of publication in light of 43 U. S. C., Ch. 8A, §315e.

4. Does the mere filing of an application for exchange under the Taylor Grazing Act segregate the land from appropriation under the mining laws?

5. Whether a summary judgment can be validly granted where the validity of the petitioner's mining claims are drawn in issue and there has been no administrative proceeding of any kind by the proper governmental agency to determine the validity of such mining claims, nor any trial with respect to this issue.

Statement.

This action arose out of conflicting claims to certain Federal public lands situated in the State of Nevada. Petitioner has claimed title under the mining laws of the United States. Husite has claimed title to a tract of land consisting of 12,000 acres patented

to it in fee simple by the Department of the Interior under the Taylor Grazing Act. A portion of the perimeter of the land claimed by Husite encompasses the land claimed by the petitioner. The land claimed by the petitioner consists of eight unpatented association placer mining locations. The amended application for exchange by Husite excluded "valid mineral rights." Petitioner is claiming that the patent to Husite included land on which it had established valid mining claims and which had been segregated from the public domain by virtue of petitioner's compliance with the mining laws *prior* in point of time to publication of notice of the Husite application and the issuance of patent to Husite.

The chronological events leading up to the action and this petition are as follows:

July 19, 1950—Husite's original exchange application under 43 U. S. C., Ch. 8, §315g filed.

July 1, 1952—Husite's amended application filed, excluding "valid mineral rights".

July 14, 1952—Dredge's location notices recorded, and asserted in Dredge's pleadings that there was a discovery of mineral on each claim.

July 19, 1952—Dredge's certificate of location recorded.

September 4, 1952—Dredge's amended certificate of location recorded.

October 1952—Publication of notice of the exchange application of Husite. The exact dates are not alleged in the Husite pleadings nor was Husite required to offer any proof of such publication by the courts below.

January 27, 1953—Date of patent to Husite for approximately 12,000 acres of land, including the two sections claimed by Dredge by reason of its asserted locations.

February 23, 1956—Date of amended patent in fee simple to Husite.

January 27, 1959—The petitioner filed a complaint in the District Court of Clark County, Nevada to quiet title to its mining claims [Fol. 1-9].

Husite moved for a More Definite Statement [Fol. 10-18]. Petitioner filed a More Definite Statement alleging, among other things, as follows:

> "Plaintiff became the owner and entitled to the following mining claims by reason of the original location of said claims on the dates shown on the following schedule." [Fol. 28].

The More Definite Statement then sets out the claim numbers, date recorded, document number and description. Discovery of minerals is alleged as of the same date as location [Fol. 28].

Husite filed an answer and counterclaim [Fol. 31-72].

After the respective parties filed their amended pleadings [Fol. 82-153], Husite moved the court for a Summary Judgment [Fol. 154-159]. Petitioner filed a cross motion for Summary Judgment and for leave to file an amended complaint [Fol. 178-189].

On January 11, 1961 the trial court denied petitioner's motions and granted Summary Judgment in favor of Husite [Fol. 370-375].

The trial court in its brief decision (less than two pages) determined that no issues of fact were created by the pleadings and stated as follows:

> "The fact remains now, however, that plaintiff did not protest at the hearing, made no effort to do so, and apparently from the file, with knowledge of the hearing." [Fol. 373]. (The "hearing" referred to by the trial court is illusory inasmuch as no hearing was ever had.)

In the trial court, petitioner filed a Brief in Opposition to Defendant's Motion for a Summary Judgment and In Support of Dredge's Motion for Summary Judgment [Fol. 190-219].

Dredge's brief pointed out the following to the trial court:

> "Unpatented mining claims are real estate to all intents and purposes. 30 U. S. C. 26." [Fol. 194].

Petitioner further pointed out the decision of the United States Supreme Court in *Emil L. Krushnic v. U. S.*, 280 U. S. 305, 74 L. Ed. 445 wherein the court states at page 316:

> "The rule is established by innumerable decisions of this court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term; and may be sold, transferred, mortgaged, and inherited without infringing any right of title in the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court. (Citing cases.) The owner is not required

to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation." [Fol. 194-196].

Petitioner in support of its claim also brought to the attention of the trial court §315e of the Taylor Grazing Act (Appendix, p. 1).

Petitioner filed a closing brief in Support of Its Motion for Summary Judgment, and in Opposition to Defendant's motion for Summary Judgment and asserted therein as follows:

"(c) The actions and procedures of Husite in this case, and the action of the Department of the Interior in attempting to deprive The Dredge Corporation of its property are, and each is, in violation of the Constitution of the United States and of the Constitution of the State of Nevada and therefore void, because each action denies due process of law and is contrary to the Administrative Procedure Act." [Fol. 282-283].

Petitioner's Closing Brief also cites passages from *Lindley on Mines*, Third Ed., Vol. 2, Tit. VI, Ch. 1, p. 1193, *et seq.* entitled "The Character of the Tenure".

"As was said by the Supreme Court of Nevada, the courts and the laws, adapting themselves to the

> necessity of the case, and governed by rules of common sense, reason and necessity, have universally treated the possessory rights of the miner as an estate in fee."

At page 1201, *Lindley* says:

> ". . . Yet, as between the locator and everyone else save the paramount proprietor the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. As between the locator and the government, the former is the owner of beneficial estate; and the latter holds the fee in trust to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor." [Fol. 286-287].

Numerous other authorities were cited by the petitioner in support of its position which were not discussed in the opinion of the trial court. Those in point here are cited *infra*. The main thrust of the lower court's decision was that Dredge had failed to file a protest to the exchange application of Husite during the period of publication. Under the *mining* laws (30 U. S. C. §30) it is provided that a protest must be filed during the period of publication of application for patent by one mining claimant against another mining claimant where there are prior mining rights asserted to the land applied for. The Taylor Grazing Act contains no such provision.

On February 4, 1961, petitioner moved for a rehearing in the trial court on the summary judgment and motion to amend [Fol. 385-387].

On March 7, 1961, Dredge's petition for rehearing in the trial court was denied [Fol. 448-450] and an order and Judgment was entered on March 13, 1961 [Fol. 448-450].

Dredge filed a Notice of Appeal on February 23, 1961 [Fol. 415-417].

Petitioner filed its Opening Brief. Husite filed its Answering Brief and plaintiff then filed its Closing Brief.

In its decision of this case (Appendix, p. 15), the Supreme Court of Nevada quotes from *Wilbur, Secretary of the Interior v. United States ex rel. Krushnic, supra,* upon which petitioner premised in part his assignments of error. The court found no quarrel with the rule of law stated in the *Krushnic* case.

The Nevada Supreme Court then states (Appendix, p. 22):

> "(5) Dredge contends: 'There was no claim by defendant Husite that there ever was a hearing or decision concerning the validity of the eight Dredge placer mining claims herein involved prior to the issuance of its patents, or at any other time. Before there could be any such decision, a contest must have been filed; a hearing must have been held under the Administrative Act; a decision rendered, with possible appeals and court action following'."

The court then states as follows:

> "The record does not show just when the Bureau of Land Management made its examination of the

ground to determine its mineral or non-mineral character. It must be assumed however that at some time during the period of two years before the asserted Dredge locations were made, such examination and determination had been made, and the application was in the process of going through the usual channels for issuance of patent."

Petitioner has previously pointed out, and it is a matter of public record, that no such determination was made on the part of the Bureau of Land Management or any other agency of the government. The requirement for a hearing was pointed out to the court in petitioner's Closing Brief citing the case of *United States v. Keith V. O'Leary, et al.*, A-27260, 63 I. D. p. 341, wherein it was stated by the then Secretary of the Interior at page 344 *et seq.* as follows:

"A valid mining claim gives an exclusive right of possession and enjoyment, and the claim is property in the fullest sense. Cole v. Ralph, 252 U. S. 286, 295 (1920). Thus a hearing on the validity of a mining claim is a hearing on a claim to property. . . . Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hear-

ing. In accordance with these decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims."

The opinion of the Supreme Court of the State of Nevada then discussed Dredge's contention that the Department of the Interior has deprived Dredge of its property in violation of the Constitution of the United States as alleged in Dredge's pleadings previously referred to. The court held as follows (Appendix, p. 24):

"That this contention is without merit is evident from the undisputed facts. Dredge does not even assert that it was ever on or ever claimed or ever heard of any part of this land for over two years after Husite filed its exchange application. Upon the filing of such application the Bureau of Land Management published notice that any adverse claimants should file their claims or objections with the Bureau. Dredge had notice and knowledge of the filing of the exchange application but filed no claims to any part of the land or any objections to the granting of Husite's application."

Contrary to the statement of the Nevada Supreme Court above, it must be noted here again that Dredge had recorded its mining locations prior to the published notice by Husite.

The court did not discuss §315e of the Taylor Grazing Act which deals with the development of mineral resources (Appendix, p. 1).

Petitioner brought to the court's attention in its opening brief on appeal the case of *Noyes v. Mantle*, 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132-1. The United States Supreme Court in that case stated:

> "At any rate, as already stated, it could not convey property which had already passed to others. A patent of the United States cannot, any more than a deed of an individual, transfer what the grantor does not possess."

In its Closing Brief in Support of Its Motion for Summary Judgment [Fol. 294] and in its Opening Brief on Appeal at pages 5, 7, 9, 18 and in its Closing Brief on Appeal at pages 16, 17, 28, petitioner brought to the attention of the courts below the case of *Montgomery v. Gerlinger*, 146 Cal. App. 2d 650, 304 P. 2d 93, which involved a conflict between a mineral claimant of unpatented placer mines and a non-mineral claimant.

The Opening Brief continued to cite cases cited in the *Montgomery* case including the case of *St. Louis Mining and Milling Co. v. Montgomery Mining Co.*, 171 U. S. 650, 655, 43 L. Ed. 320, 322, 19 S. Ct. Rep. 61 and 63 wherein the then Chief Justice declared that:

> "Where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator."

In its decision of *Dredge v. Husite*, the Supreme Court of the State of Nevada states as follows (Appendix, p. 19):

> "Appellant in support of its contention that a valid mining claim properly located and maintained

in accordance with the law segregates the ground legally embraced therein from the public domain, to the end that the United States may not lawfully convey such ground to a subsequent applicant, cites among others, the following cases. (Citing cases.)

"A careful examination of those cases shows that in every one the mining claim upon which reliance was placed was a valid mining claim."

The Supreme Court of the State of Nevada then concluded that the cases cited did not apply since proof of a valid mining claim did not exist in the pleadings of Dredge.

The Supreme Court of Nevada in its opinion states (Appendix, p. 20):

"We have heretofore cited in some detail Dredge's more definite statement filed in response to Husite's demand. Yet it refrained from any allegation or assertion that it had ever made a discovery of mineral, to any extent whatsoever, that it ever erected a monument, drove a stake, or posted a notice, restricting itself to an unsworn statement signed by its attorneys that it had recorded *location notices,* whose dates showed that the 'asserted locations' had been made over two years after the filing of Husite's exchange application."

Dredge's more definite statement did contain, however, the schedule of the original location of its mining claims including the dates recorded, the document numbers and the description of the property located. The Nevada Supreme Court did not take judicial

recognition of the fact that location notices and certificates of location once recorded were matters of public record. Such notices and certificate contain statements that a discovery had been made, that a stake was driven and that notices were posted on the property. The location notices and certificates of location further showed the amount of money expended, the nature of the work performed, where such work was done on the property, and the other acts required by the mining laws.

Again it should be noted that the recording of the location notices was done at a point in time prior to publication of the Husite exchange application.

The pleadings by Husite raised the question of the validity of the Dredge mining claims and the court *assumed* that they were invalid in spite of the fact that there had been no notice of contest or of any hearing by the proper governmental agencies. The Nevada Supreme Court did not discuss the *United States v. Keith V. O'Leary* decision.

Reasons for Granting the Writ.

The decisions below should be reviewed because they erroneously interpret the Taylor Grazing Act so as to render nugatory the language contained in §315e of that Act and prohibit the application of the mining laws. The question as to whether a protest is necessary on the part of a mining claimant against an applicant for surface grazing lands in the light of §315e of the Taylor Grazing Act has not yet been determined by the United States Supreme Court.

1. The language of the Supreme Court of Nevada (Appendix, p. 24) would have the effect of restrict-

ing prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of such land as soon as an application was filed for an exchange under §315g of the Taylor Grazing Act. If this were the intent of Congress, then why was §315e of the Taylor Grazing Act inserted?

An interpretation of §315e of the Taylor Grazing Act, or its lack of interpretation by the state court, has had the effect of denying to the petitioner a right which has been expressly granted by Congress in that section of the Act. The Nevada Supreme Court has thus assumed a power which it does not possess and which it cannot validly exercise.

2. The Supreme Court of the State of Nevada has also assumed that there had been a determination by the Bureau of Land Management that the lands patented were non-mineral in character. There was nothing in the record to indicate this fact as the court itself had pointed out. As a matter of fact and of public record, no such determination was made by any agency of the government. Thus, by patenting the land claimed by petitioner to Husite, petitioner was denied the procedural due process of law provided for that purpose in the Administrative Procedure Act respecting mining claims. *United States v. Keith V. O'Leary et al.*, 63 I. D. p. 341, cited *supra* is unequivocal in its statement of the policy of the Department of the Interior in this regard.

There can be no question that had petitioner filed a protest during the pendency of Husite's application for exchange that a hearing would have taken place and petitioner would have been afforded due process.

Was the petitioner, a mining claimant, required to file a protest against an applicant for surface grazing land under the Taylor Grazing Act. This would again call for an interpretation of §315e concerning the development of mineral resources.

To summarize the conflict that exists as a result of the decision of the Nevada State Supreme Court:

That court has held as a matter of law that no valid mineral rights existed in the petitioner at the time patent was issued to Husite Company or during the application for exchange. Yet it has been stated as the policy of the Department of the Interior in the *O'Leary* case *supra* that a hearing is required under the Administrative Procedure Act to determine the validity of mining claims in order to satisfy procedural due process as guaranteed by the Fifth Amendment of the Constitution of the United States.

Montgomery v. Gerlinger, supra held that the rights of the placer mining claimants were superior to those of a subsequent non-mineral patentee from the United States notwithstanding the fact that they had not filed a protest. The Supreme Court of Nevada distinguished the case on the ground that petitioner had failed to prove the existence of a valid mining claim.

The Supreme Court of the United States has stated that a properly located unpatented mining claim "for all practical purposes of ownership, is as good as though secured by patent". Since the location of petitioner's mine was prior in point of time to the patent to Husite, or for that matter prior to publication of the Husite exchange application. The decision of the Nevada State Supreme Court is in direct conflict with the

decisions of the Supreme Court of the United States in *Krushnic v. U. S.*, *Noyes v. Mangle*, and *Lynch v. U. S. (supra)*, and has thus deprived petitioner of the rights reserved to it by these United States Supreme Court decisions.

The questions presented by this case are of great and recurring significance with respect to the development of mineral resources on public lands.

If the right to develop mineral resources ceases to exist after an application for exchange is filed under §315g; and before patent is issued, then a judicial determination of this fact by the United States Supreme Court will act as a guide to those who engage in prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts subject to the Taylor Grazing Act, and time, effort and means will not be expended by such persons.

If §315e of the Taylor Grazing Act preserves the right to develop mineral resources, then petitioner has been denied that right by the Supreme Court of Nevada in the assumption by it of a power that it does not possess.

Of additional importance is the denial of the right of the petitioner to the procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States with respect to an administrative determination of the validity of its claim as provided by the Administrative Procedures Act (Appendix, pp. 5-6).

If the land located by a mining claimant is free land for all intents and purposes, then in the absence of a contest by the Bureau of Land Management of the

Department of the Interior to determine the validity of the mining claim, the decision of the Supreme Court of the State of Nevada is erroneous and should be reversed. For the correct disposition of this case the Supreme Court of the State of Nevada should have followed the decision by the United States Supreme Court *In re Emblen*, 161 U. S. 52, 56 (Appendix, p. 7).

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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